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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-751

PALM BEACH NEWSPAPERS, INC., a Florida corporation, GREGORY E. FAVRE, R. H. KIRKPATRICK, TOM SAWYER and JANE ARPE, *Petitioners,*

vs.

LLOYD F. EARLY, *Respondent.*

On Petition for Writ of Certiorari to The Seventeenth Judicial Circuit Court, Broward County, Florida

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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November 23, 1973

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The Miami Herald Publishing Company, a division of Knight Newspapers, Inc. (*"The Miami Herald"*) and the Southern Newspaper Publishers Association hereby respectfully move for leave to file the attached brief amicus curiae in this case. The consent of the Petitioners has been obtained. The consent of the Respondent was requested but refused.

The interest in this case of *The Miami Herald* arises from the fact that it is the largest newspaper in Florida and frequently faces litigation raising questions similar to those involved in this case. *The Miami Herald* filed a Brief Amicus Curiae in this case in the Supreme Court of Florida. The interest in this case of the Southern Newspaper Publishers Association arises from the fact that its members publish 407 newspapers throughout Florida and the southern United States, and these newspapers also are frequently involved in such litigation.

The issues involved in this case present substantial questions involving the practical application of the doctrine of *New York Times v. Sullivan*, and *The Miami Herald* and the Southern Newspaper Publishers Association are vitally concerned with these issues.

Respectfully submitted,

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BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. STATEMENT OF AMICI CURIAE

As appears from the Petition for Certiorari and as set forth herein, the issues raised by this case present substantial questions affecting the rights of free speech and free press. The decision which is sought to be reviewed

is in direct conflict with numerous decisions of this Court and other Federal and State Courts. Ample and compelling grounds exist for this Court to grant the requested writ of certiorari. Unless this Court accepts jurisdiction in this case and reviews the decision below, the resulting injury to the right of free expression will be immediate and substantial, and any subsequent appellate review of a final judgment in this action would be wholly inadequate to remedy this injury.

For the reasons set forth in the Petition for Certiorari and herein, this Court should grant the Petition for Certiorari and reverse the decision of the Court below.

II. STATEMENT OF THE CASE

The facts in this case are set forth in the Petition for Certiorari and will not be repeated here.

III. ARGUMENT

The Orders of the Circuit Court which Petitioners seek to have reviewed will result in immediate and irreparable injury to the rights of free speech and press under the First Amendment to the United States Constitution. Respondent Early ("Early") is a public official and the publications upon which this case is based clearly relate to his official conduct. Early cannot recover in this action unless he proves that the statements of which he complains were false, and that they were made with actual malice, that is, with knowledge of their falsity or reckless disregard of their truth or falsity. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

Petitioners moved for summary judgment in the Circuit Court on the grounds that the articles complained of by Respondent were not published with actual malice,

under the rule of *New York Times v. Sullivan.* The Circuit Court ruled that many of the articles complained of were clearly not libelous. As to the remaining articles, the Court refused to hold that there was insufficient showing of actual malice, holding instead that defendants had not carried the burden "to demonstrate affirmatively the absence of any facts and inferences that would create an issue of conspiracy." Upon rehearing, the Court again denied the motion for summary judgment as to actual malice. The Court's opinion and order ignored the United States Supreme Court decision six weeks earlier in *Rosenbloom v. Metromedia,* 403 U.S. 29 (1971), which held that in cases such as this, the plaintiff has the burden of demonstrating actual malice by clear and convincing evidence. 403 U.S. at 52.

In view of the applicable constitutional precedents, it is extremely unlikely that Respondent will succeed in his libel action. Yet the pre-trial discovery allowed by the Circuit Court, if not prohibited by this Court, will have an immediate, serious, and irreparable effect upon Petitioners, and set a dangerous precedent for other libel actions involving public officials. These constitutional issues present a compelling case for this Court to act to prevent substantial abuses of the rights of freedom of speech and press.

In numerous First Amendment cases, the Courts have recognized that the litigation process itself may have a constitutionally impermissible chilling effect on freedom of expression. If a newspaper, for example, must face the prospect of protracted litigation each time it publishes articles on controversial subjects, the newspaper might tend to begin avoiding controversies. Therefore, the Courts

have struck down deterrents to free publication whose "chilling effect" would tend to induce self-censorship.

One of the principal reasons for the doctrine announced in *New York Times v. Sullivan, supra,* was to provide more "elbow room" for free expression on subjects of public interest and concern. This principal was restated as follows in *Rosenbloom v. Metromedia:*

> "The very possibility of having to engage in litigation, an expensive and protracted process, is threat enough to cause discussion and debate to 'steer far wider of the unlawful zone' thereby keeping protected discussion from public cognizance. *Speiser v. Randall,* 357 U.S. at 526." 403 U.S. at 52-53.

To avoid impermissible deterrents to free expression, this Court has held that in a libel action involving public issues, the plaintiff has the burden of proving by clear and convincing evidence that the publication was made with actual malice. In applying this doctrine, the Courts have recognized that procedural matters must necessarily be affected by the doctrine. As the Court of Appeals for the District of Columbia held in *Washington Post Co. v. Keogh,* 365 F.2d 965, 968 (D.C.Cir. 1966), *cert. denied,* 385 U.S. 1011 (1967):

> "In the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate. One of the purposes of the *Times* principle, in addition to protecting persons from being cast in damages in libel suits filed by public officials, is to prevent persons from being discouraged in the full and free exercise of their First Amendment

> rights with respect to the conduct of their government. *The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself,* especially to advocates of unpopular cases. . . . Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors. And to this extent debate on public issues and the conduct of public officials will become less uninhibited, less robust, and less wide-open, for self-censorship affecting the whole public is 'hardly less virulent for being privately administered.' " (Emphasis added.)

If a public official plaintiff in a libel action against a newspaper is allowed, through the guise of discovery on the issue of punitive damages, to obtain access to the confidential financial affairs of the newspaper before making any showing that he has any chance of meeting the malice test, it would result in precisely the "chilling effect" which the *New York Times v. Sullivan* doctrine was designed to eliminate. One of the most important reasons for granting protective orders against overly broad discovery is the harassment that would result from allowing a plaintiff to use his litigation as an excuse for a fishing expedition through the books and records of a business. Thus the courts in non-First Amendment cases have often protected litigants from such harassing discovery. Even more so, in First Amendment cases such as this, it is crucial for the courts to apply limitations to overly broad discovery, lest its chilling effect eviscerate the constitutional protections of the *New York Times v. Sullivan* doctrine.

The irreparable and substantial injury which will occur to the Petitioner Newspaper (the "Newspaper") if the Circuit Court's order is allowed to stand is obvious. Once disclosure is made of the Newspaper's "books, account books and records, including any net worth and profit and loss statements" and all income tax statements, the damage has been done. If the discovery is allowed, no subsequent appellate decision holding the discovery improper could reverse the fact that the information would already have been disclosed.

The Newspaper has already furnished Early with sworn statements summarizing its net worth, total assets and liabilities for 1969, 1970 and 1971. Thus Early has already received more than he is entitled to on the issue of financial condition of the Newspaper.[1] Such information is the only aspect of the Newspaper's financial status that is conceivably relevant to the punitive damage claim in this case. The Newspaper has admitted a net worth of approximately $14 million, an amount far in excess of the maximum amount claimed as punitive damages by Early. He should not be allowed a fishing expedition to probe beyond this admission, unless he is able affirmatively to show reasonable grounds to believe that the Newspaper's sworn statements of net worth are false.

This Court has held that a public official plaintiff in libel cases such as this must pass an extremely stringent test to impose liability upon a newspaper for publications critical of the official's public actions. However, even if the publisher eventually wins on the merits, his victory

[1]If plaintiff is entitled to any pretrial discovery on the issue of punitive damages, it should be limited to the net worth information already provided by the Newspaper. This information should be deposited under seal with the Court, to be available to plaintiff only if he is successful in establishing his cause of action at trial.

may be a pyrrhic one if the litigation process exposes him not only to substantial expense, but also forces him to reveal his confidential financial affairs. The prospect of such a result would clearly create the "chilling effect" sought to be avoided by *New York Times v. Sullivan* and its progeny. To avoid this result, the discovery of a newspaper's financial affairs should be barred unless and until plaintiff can affirmatively show that he is likely to be able to meet his burden of proving actual malice by clear and convincing evidence. "For the stake here, if harassment succeeds, is free debate." *Washington Post Co. v. Keogh, supra.*

A public official plaintiff in a libel action should not be able to obtain discovery as to the confidential financial affairs of a newspaper, ostensibly on the issue of punitive damages, unless and until the plaintiff can demonstrate affirmatively that he can carry his burden of proving by clear and convincing evidence that the newspaper acted with actual malice. There is ample precedent for such deferrals of discovery in which the burden of discovery on the defendant would be substantially greater than any immediate benefit to plaintiff. Thus, discovery as to the financial affairs of a defendant should be prohibited until the plaintiff establishes his substantive right to the information.

The rationale for the principle that discovery as to a defendant's financial affairs in tort actions, such as libel and malicious prosecution, should be conditioned upon the plaintiff's making an affirmative showing of his right to collect punitive damages from defendant was persuasively articulated in *Gierman v. Toman*, 77 N.J. Super. 18, 185 A.2d 241, 244 (1962):

> "There is no connection between a defendant's wealth and compensatory damages but there is such connection when exemplary damages are demanded. The obviously objectionable features of the present demand are invasion of a traditionally personal and private domain as well as inconvenience of disclosing details. Strictly speaking, orderly procedure requires liability to be proved before damages are available. However, since pretrial discovery precedes proof, should a *prima facie* showing of the right to damages support such a demand? Defendant, even when successful in litigation, absorbs unrecoverable costs and inconvenience. While orderly procedure is preferable, deviation is common practice. The exigencies of a trial require departure at times. However, where a right of a litigant to insist on orderly procedure raises a substantial question of prejudice, albeit of an intangible nature, the strict adherence to procedure seems called for where the character of the harm is irreparable. See Handelman v. Handelman, 17 N.J. 1, 10, 109 A.2d 797 (1954). Just and orderly procedure here requires that *prima facie* proof of the right to recover punitive damages should precede the right to a general disclosure of wealth; and as to specific details such as requested here, the rules furnish sufficient protection against abuse and harassment."

Not only is this doctrine logically sound; it is constitutionally required in tort actions governed by the First Amendment.

IV. CONCLUSION

For the foregoing reasons, and those stated in the Petition for Writ of Certiorari, a writ of certiorari should issue to review the judgment and opinion of the Circuit Court for the Seventeenth Judicial Circuit, Broward County, Florida.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae have been furnished by mail this 21st day of November, 1973 to the following:

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